

OGC 73-2119

12 November 1973

MEMORANDUM FOR: Information Processing Coordinators

SUBJECT : U.S. v. International Business Machines Corporation—Production of Documents

OGC Has Reviewed

1. In a memorandum to the Deputy Directors, Inspector General, Director of National Estimates and Director of Planning, Programming and Budgeting on this subject dated 4 April 1972, the Executive Director-Comptroller requested that a listing of Agency documents responsive to court orders in this case be prepared by each addressee. Subsequently, the Agency responded to the court orders to the extent of permitting IBM to inspect all unclassified documents, both active and those in storage. However, on 27 April 1972 the Director submitted an affidavit to the court declining to permit inspection of classified documents on the grounds of his statutory responsibility to protect intelligence sources and methods from unauthorized disclosure. In response to a supplemental court order, the Director, on 18 January 1973, submitted a second affidavit declining to submit a list of all responsive documents withheld on the claim of privilege.

2. Although the court has not formally ruled on the Director's claim of privilege, it has made it clear that the exercise of this privilege may seriously jeopardize the government's case. We have been asked by the Department of Justice to do everything we can to respond more positively to the court orders. I have advised the Justice trial attorney that we will re-examine the records we are withholding to determine if there is any way to offer a compromise solution acceptable to the court and the defendant.

3. Addressees are requested at this time to review the listings of active and stored classified documents prepared in response to the Executive Director-Comptroller's memorandum of 4 April 1972. You should determine whether the descriptions of the documents are adequate for IBM to determine their probable relevance. You should further determine whether the listing is unclassified or could be revised to be unclassified so as to permit examination by IBM. Upon review of your work, we will consider advising the Director to permit submission of the listings for examination by IBM in order that they may identify the documents they would want to examine in preparing their defense.

4. Simultaneously with your review of the listings, you should examine a substantial representative selection of pertinent documents to determine if any of them could be declassified, sterilized, summarized in unclassified form or otherwise made acceptable for examination by defendant without disclosing sensitive information. If this can be done with any significant portion of the documents, we will consider recommending to the Director that we permit these to be inspected by IBM.

5. This is only an attempt to find a compromise that will avoid prejudicing the government's anti-trust action while still protecting intelligence sources and methods. It is not a precise response to the court's orders. We do not know if it will be acceptable to the defendant or to the court. The Department of Justice feels strongly, however, that some effort to respond positively must be made and that the more responsive we are, the more likely it is that the court will uphold the Director's refusal to permit inspection of very sensitive documents. The Justice trial attorney will next appear before the court on 21 November 1973. He will be asked at that time about the Agency's response to the court's orders. We hope to be able to tell him that he may say that the Agency is re-evaluating its refusal to permit inspection of any classified documents, and that the court will accept this explanation and grant adequate time for the re-evaluation of our position. In order to meet this schedule, I will need at least your initial comments on the feasibility of this approach by 15 November.

6. The court has modified its previous orders to some extent in regard to the documents to be produced by agencies with national security responsibilities. To bring you up to date, the following is quoted from a recent court order:

...the parties have agreed to limit production...to:

a. EDP documents of the person or persons chiefly responsible for EDP procurements, operations or policy (it is recognized that sometimes this will consist of department documents as well as the person's personal documents* depending on the individual and the agency), and

* * * * *

c. other documents relating to the bid, procurement, study, use, consideration or evaluation of EDP products or services, or of the suppliers thereof....


Documents requested are those dated from January 1, 1961 to December 31, 1972.

Documents include letters, memoranda, notes, routing slips; telephone, TWX and other messages; flip charts, drafts, summaries, accounting books and records, listings, brochures, directives, regulations, studies, analysis, diaries, reports, forms, proposals, transcripts, minutes, exhibits, and all other writings and reproductions, whether typed, handwritten, printed, copied in computer readable form, or otherwise, and whether contained in storage files, central files, project files, contract files, user files, policy files, personal files, desk files, chronological files or elsewhere.

* Personal documents include those EDP documents contained in such files as the desk files, day files, chronological files, correspondence files and subject files maintained by or for the person involved.

Electronic Data Processing Product or Service includes data processing products which are capable of electronically entering, receiving, storing, classifying, computing, converting, controlling, displaying, or recording data, or which are interconnected with any such product; and maintenance, programming, management, integration, support, testing, consulting, feasibility studies, systems analyses, systems design and development or education services with respect to any such product or service.

STATINTL


Associate General Counsel

STATINTL

Addressees:



Information: Inspector General
D/PPB

OGC:JDM:cap

Original - 1st Addressee

- ✓ 1 - OGC Subj: LITIGATION-CIVIL
- 1 - JDM Signer
- 1 - Chrono.